(34,178)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 869

ARTHUR E. COLGATE, ADMINISTRATOR OF THE ESTATE OF CLINTON G. COLGATE, DECEASED, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fols. a & 1]

IN THE COURT OF CLAIMS

No. H-188

ARTHUR E. COLGATE, Administrator of the Estate of Clinton G. Colgate, Deceased,

v.

THE UNITED STATES

I. PETITION—Filed May 4, 1927

Arthur E. Colgate, Administrator of the estate of Clinton G. Colgate, respectfully represents:

I. Plaintiff is the duly appointed administrator of the estate of Clinton G. Colgate, who died in the City of New York, on the 23d day of November, 1886. Clinton G. Colgate was a citizen of the United States and resident in his lifetime in the City and State of New York. Plaintiff is likewise a citizen of the United States having domicile and place of business in City of New York, State of New York.

II. Plaintiff's decedent, Clinton G. Colgate, was the assignee and owner of certain letters patent numbered 65019 issued by the United States Patent Office to George B. Simpson, May 21, 1867, covering the use of gutta percha insulation for electrical purposes. The invention covered by said letters patent was the private property of decedent by duly executed and recorded assignments, with all claims and demands for infringements of the said patent or use of the same.

[fol. 2] III. On sundry and divers dates since the said 21st of May, 1867, without any license or permission from the decedent or his assignors, the Government of the United States by its officers and agents, civil and military, took for public use, and after the several dates of taking did continuously use and employ for its own purposes and profit the invention covered by the said letters patent. The said invention was taken as aforesaid by the Secretary of War for use in constructing and operating the telegraph lines

for the Signal Service, authorized by Section 223 of the Revised Statutes, and at the time of such taking and use, Signal Stations at points separated by water could not conveniently, if possibly, have been constructed and operated in the form of a "suitable telegraph line" without such taking and use. The said invention was also taken and used by the Weather Bureau of the Department of Agriculture on numerous occasions.

IV. The United States never compensated the said decedent during his lifetime, nor his estate since his death, for the use of the said invention. The decedent has repeatedly petitioned Congress for such compensation and subsequent to his death his legal representative renewed the petition and a bill known as Senate 2771, 1st Session, 50th Congress, was introduced providing for relief, and this bill by resolution of the Senate of the United States was referred August 23, 1888, to this Court for findings of fact under the acts of March 3, 1883, and 1887. This court on December 4, 1916, filed its findings of fact and these were reported to the Senate on February 3, 1917, Senate Document 703, 64th Congress, 2d Session. A copy of the findings so made and reported is appended hereto as Exhibit "A."

[fol. 3] V. The Congress of the United States failed over a number of years to make any appropriation carrying into effect the findings of the Court of Claims as set forth in the preceding paragraph. In the Second Session of the Sixty-ninth Congress a bill for the relief of the plaintiff as administrator aforesaid passed the Senate but failed of passage in the House of Representatives, and in lieu thereof a private act, No. 450, approved March 3, 1927, was passed in terms as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the findings of fact made by the Court of Claims in the case of Arthur E. Colgate, administrator of the estate of Clinton G. Colgate, deceased, against the United States Congressional, Numbered 6063, Senate Document Numbered 703, Sixty-fourth Congress, second session, be, and they are hereby, referred back to the Court of Claims with jurisdiction to render judgment as the findings of fact heretofore found and the law require: Provided,

That either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion of law or judgment, from which appeals now lie in other cases, at any time within ninety days after the rendition of judgment: Provided further, That the amount of any such judgment shall not exceed the sum of $50,000: And provided further, That such notice hereof shall be given to the Attorney General of the United States as may be provided by orders of said court, and it shall be the duty of the Attorney General to cause one of his assistants to appear and defend for the United States."

Plaintiff says that the facts found by this court are true and correct and that based thereon there exists a valid and just claim upon the United States in favor of the estate of [fol. 4] the decedent for fair compensation for the taking and use of the invention of plaintiff's decedent, the fair and reasonable value of which use is the sum of $50,000.

VI. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims $50,000.

King & King, Attorneys for Plaintiff.

Sworn to by Arthur E. Colgate, April 11, 1927.

[fols. 5-11] Exhibit "A" to petition omitted in printing. See findings of fact, page 13.

[fol. 12] II. General Traverse—Filed June 13, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.
Henry C. Workman, Attorney.

III. Argument and Submission

On March 5 and 6, 1928, this case was argued and submitted on merits by Mr. George A. King, for plaintiff, and by Mr. Henry C. Workman, for defendant.

[fol. 13] IV. **Special Findings of Fact, Conclusions of Law, and Opinion of the Court by Booth, Ch. J.**—Filed February 4, 1929

This case having been heard by the Court of Claims upon the findings of fact reported December 4, 1916, in Congressional case No. 6063, the court, in accord with the special act of March 3, 1927, recites said findings as follows as its

Special Findings of Fact

I

On January 31, 1848, the patentee, Simpson, filed in the Patent Office and application for a patent for "conducting electricity through water." In this application Simpson described his invention as follows:

The conducting wire was—

"first insulated with insoluble india rubber or gutta-percha; the insulated wire is then covered with glass beads (B) socketed together so as to form a close joint * * *, an soluble india-rubber tube (D) is then drawn over the glass-bead chain, jointed, cemented, and banded together (E) so as to be both water and air tight. The object of this arrangement or combination is to guard against and pre-

vent the water from coming in direct contact with the telegraphic wire, thus securing the entire control of this mysterious agent. This combination secures the object so desired."

He claimed the invention as follows:

"Now, what I claim by my invention and desire to secure by letters patent is the combination and arrangement of the gums and glass around the telegraphic wire in such form as to secure the controlling power of the mysterious agent, 'electricity,' as hereinbefore described."

Subsequently and in support of said application Simpson filed in the Patent Office a second specification "as being more explicit than the first one and as supplying the former deficiency and as embracing the whole principle of his plan for which he had asked a patent." No patent was ever issued upon this application.

[fol. 14]

II

On April 2, 1849, Simpson filed another application for a patent entitled "mode of insulating telegraph wires," in the specification of which he stated that the nature of his invention was shielding the wire from contact with any and all conducting matter—

"by covering it with india rubber, glass beads, and gutta-percha, either together or separate."

Also—

"The gutta-percha must be softened by any of the well-known processes, and when in a malleable or plastic state I spread it in any desired thickness around the wire; this operation when well and carefully done is sufficient of itself without any other coating to insulate the wire and for all ordinary practical purposes."

Also "for further security and to guard against rough usage" he specified that the wire was also covered with a coating of india rubber and with a series of glass beads, and over the beads he placed a coat of gutta-percha.

No drawing or specimen accompanied the application, but these were filed June 16, 1849, upon requisition therefor. In this application the invention claimed was—

"the application of gutta-percha as a covering or shield for wire to insulate it for electromagnetic telegraphs and also the application of india rubber, glass beads, and gutta-percha, together in the manner and for the purpose hereinbefore described.

"I do not claim the application of glass beads alone as a covering to insulate electromagnetic wires, that having been in use before my discovery. I do not claim the application of india rubber or metallic rubber alone as a covering to insulate electromagnetic wires, that having been in use before my discovery."

This application was rejected on the ground that the invention was not found new. On January 15, 1851, Simpson wrote the Commissioner of Patents relating to this application as follows:

"I herewith withdraw my application for a patent for a mode of insulating telegraph wires, now in your office, and request that $20 may be refunded to me in gold, agreeable to an act of Congress in such case made and provided."

III

December 24, 1858, Simpson filed another application for patent for "a new and improved submarine telegraph cable." The invention claimed was the combination of gutta-percha and metallic wire in such form as to encase a wire or wires or other conductors of electricity within the nonconducting substance gutta-percha.

This application was rejected on the ground that insulating electrodes with gutta-percha was well known and that the journals of France, England, and this country for several years had fully treated the subject and also on the ground that the alleged invention was abandoned to the public.

Simpson appealed from this rejection to the board of committee of appeals, and said rejection was confirmed by said committee.

[fol. 15]

IV

October 8, 1859, Simpson filed another application for patent for "submarine telegraph cable," the same in subject matter as the preceding, together with certain affidavits and exhibits in support of his claim to a patent. This application was rejected on grounds similar to those in the preceding application. Simpson again appealed to the board, who again reached their former conclusion. On May 9, 1860, the commissioner confirmed the board's decision and refused to grant a patent. Simpson then appealed to the United States Circuit Court for the District of Columbia, which overruled the appeal and confirmed the action of the Commissioner of Patents.

V

On May 4, 1866, Simpson filed another application for a patent. The specification and claim of this application were similar to those contained in the application mentioned in Finding IV. Upon this application on May 21, 1867, a patent No. 65019, and the one in controversy in this case, was issued to Simpson. The validity of this patent was sustained in the following cases: Colgate v. Western Union Telegraph Co., 15 Blatch., 365; Colgate v. Gold and Stock Telegraph Co., 16 Blatch., 503. The opinion in the above case of Colgate v. Western Union Telegraph Co. gives what was then considered by the court a complete history of the invention in question and is referred to for information upon that subject.

VI

May 12, 1848, one John J. Craven, of Newark, N. J., filed an application for patent entitled "Mode of preparing wire for electromagnetic purposes," and his claim of invention was substantially the same as the several claims of Simpson heretofore stated.

The application of gutta-percha to coating wires was disclosed in numerous printed publications and foreign patents, among which are the following:

British patent to Cooke, No. 9645, of 1842, which described a coating of india rubber as a means of insulation for telegraph wires, enrolled September 8, 1843.

British patent to Nickels, No. 10897, of 1845, which discloses the covering of wire piano strings with gutta-percha, enrolled April 27, 1846.

British patent to Brett et al., No. 11576, of 1847, which discloses the electrical insulation of metal with caoutchouc and "the substance known as vulcanized india rubber," enrolled August 11, 1847.

British patent to Reid, No. 11974, of 1847, enrolled May 23, 1848, which discloses the covering of electrical wires with gutta-percha for insulation. The third claim of this patent disclaims the use of gutta-percha for the "mere coating or covering of said electro telegraphic wires."

British patent to Barlow, et al., No. 12136, of 1848, enrolled October 27, 1848, which discloses improvements in [fol. 16] the "means of covering and thus protecting insulating wires of telegraphs when gutta-percha is used as the material or part of the material for covering such wires."

British patent to Henley, et al., No. 12236, of 1848, enrolled February 10, 1849, which discloses an "improved compound of gutta-percha suitable for the insulation covering and exterior protection of wire and other metallic substances employed to transmit currents of electricity."

It also appears that prior to the first application of Simpson for a patent for this alleged invention the matter of the insulation of telegraph wires by means of gutta-percha and other substances for several years had been the subject of much discussion in the scientific journals of Europe and particularly of Germany.

The date of enrollment of the British patents above given is the date when specifications were filed and made public.

VII

The title in the Simpson patent was in Arthur M. Eastman from March 29, 1871, until September 3, 1877, when it passed under his will to his wife, Elizabeth H. Eastman, who, on November 15, 1877, individually and as executrix, transferred the patent to Clinton G. Colgate. This transfer

of title to Colgate was a voluntary assignment and not by operation of law.

VIII

After the validity of the Simpson patent had been sustained in litigation with the Western Union Telegraph Co., as reported in that case, as before stated in fifteenth Blatchford, 365, said telegraph company entered into an agreement with the plaintiff therein whereby the sum of $100,000 was paid for all past infringements and a schedule of license fees was established for the future, and similar agreements were made with other parties desiring to use the patented invention.

IX

The United States Government has by its Signal Service and Weather Bureau used submarine cables consisting of metallic wires employed as conductors of electricity encased with gutta-percha as an insulating agent between 1873 and 1883, and by applying the rates fixed in the schedules named in the last finding the claimant would have been entitled to the sum of $50,000 for such used.

X

Considerable evidence was produced in this court relating to the priority of the invention of the device in question by said Simpson which was not before the courts in the cases heretofore mentioned, where such invention was sustained.

[fol. 17]

XI

The law in force at the time of Simpson's applications for patents was the patent act of 1836. (5 Stat. L. 117.) Section 7 of said act reads, in part, as follows:

"And be it further enacted, That on the filing of any such application, description, and specification, and the payment of the duty hereinafter provided, the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery; and if, on any such examina-

tion, it shall not appear to the commissioner that the same * * * had been patented or described in any printed publication in this or any foreign country * * * it shall be his duty to issue a patent therefor."

Also the patent act of 1839 (5 Stat. L. 353). Section 6 of that act is as follows:

"Sec. 6. And be it further enacted, That no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and thirty-six, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application: Provided, That the same shall not have been introduced into public and common use in the United States prior to the application for such patent: And provided also, That in all cases every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters patent."

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Booth, Chief Justice, delivered the opinion of the court:

This case is governed by a special jurisdictional act approved March 3, 1927, which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the findings of fact made by the Court of Claims in the case of Arthur E. Colgate, administrator of

the estate of Clinton G. Colgate, deceased, against the United States, congressional, numbered 6063, Senate Document Numbered 703, Sixty-fourth Congress, second session, be, and they are hereby, referred back to the Court of Claims with jurisdiction to render judgment as the findings of fact heretofore found and the law require: Provided, That either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion [fol. 18] of law or judgment, from which appeals now lie in other cases, at any time within ninety days after the rendition of judgment: Provided further, That the amount of any such judgment shall not exceed the sum of $50,000: And provided further, That such notice hereof shall be given to the Attorney General of the United States as may be provided by orders of said court, and it shall be the duty of the Attorney General to cause one of his assistants to appear and defend for the United States."

The case was before the court in 1916 upon a congressional reference, and findings of fact were made and transmitted to Congress on December 4, 1916. The special jurisdictional act expressly limits the adjudication of the case to the findings heretofore made by the court and leaves for final consideration by the court the single issue of law applicable thereto. The case itself is one of ancient origin and sui generis in many of its aspects. Simpson, the original patentee, filed his first application for a patent January 31, 1848. The application embraced but one claim and that, as appears from Finding I, was for a "combination and arrangement of the gums and glass around telegraphic wire in such form as to secure the controlling power of the mysterious agent 'electricity.'" In April, 1849, the applicant filed a new application, going more into detail and especially amplifying his invention. The applications were rejected by the Patent Office, and on January 15, 1851, the applicant wrote the letter set out at the close of Finding II. Almost eight years later, on December 24, 1858, the inventor filed another application containing without important modifications a claim for his original invention. This application was rejected on the ground of public knowledge of the alleged invention and abandonment of the same. From the order rejecting this applica-

tion the applicant unsuccessfully appealed to the board of committee of appeals. On October 8, 1859, another application was filed, containing the same subject matter, and again it met with a rejection order, predicated upon the same ground as the preceding rejection. The applicant again appealed, resulting in a confirmation of the order of rejection. The applicant then appealed to the United States Circuit Court for the District of Columbia, receiving finally a decision adverse to his contentions. On May 4, 1866, another application was filed covering again the same subject matter, and as a close to the proceedings the application was allowed and letters patent issued to the inventor on May 21, 1867. The findings disclose the subject matter of the invention; no issue arises with respect thereto.

The jurisdictional act uses these words, "to the Court of Claims with jurisdiction to render judgment as the findings of fact heretofore found and the law require." Both the plaintiff and the defendant seem to be in accord with the construction of the statute, that the law applicable to the case is the statutory law in force and in existence at the time the controversy arose and continued. We think the parties are correct in this respect. Congress was fully apprised as to the facts. The existing doubt as to liability arose upon a legal point, and the plaintiff was afforded a forum and opportunity to present his contentions as to the legal liability of the defendant, and the defendant granted equal rights with respect to any available defenses.

[fol. 19] The plaintiff insists that the validity of the patent has been repeatedly established in courts of competent jurisdiction and that this issue is res adjudicata.

The original assignee of the patent, Colgate, commenced a suit in equity against the Western Union Telegraph Company to enjoin infringement of the patent herein involved in the United States Circuit Court for the Southern District of New York. (15 Blatch. 365.) Then Circuit Judge Blatchford on November 26, 1878, delivered the opinion of the court. In the opinion, a very exhaustive one, the court covered and disposed of every defense now raised by the defendant, lack of novelty, anticipation, abandonment, and alleged illegality of procedure in the Patent

Office. An injunction was granted and an accounting decreed. Subsequently the defendant paid the plaintiff $100,000 in satisfaction of past infringement and for a license for future use.

The above case, subsequently followed by additional litigation involving Simpson's patent, would, of course, in the usual course of judicial procedure, determine the issue as to validity. See also Colgate v. Western Union Telegraph Co., 19 Fed. 828; Colgate v. Gold and Stock Telegraph Co. (Federal cases #2991); United States v. Colgate, 21 Fed. 318; United States v. Colgate, 32 Fed. 624; Colgate v. International Ocean Telegraph Co. (Federal cases #2993); Colgate v. Compagnie Francaise Du Telegraphe de Paris a New York, 23 Fed. 82.

The jurisdictional act is positive in expression and devolves upon the court the necessity of adjudicating the case upon the findings made in 1916. The findings reported to the Senate in 1916 followed from a quite voluminous record, including, of course, the documents recited therein, and were not excepted to by either party subsequent to their announcement, so that they did not reflect to the satisfaction of the parties the facts of the case from the record made up during the course of the trial of the same. The court, in view of this situation, has no alternative except to take the case and adjudicate it upon the existing findings and the applicable law. The court would have little trouble in doing so were it not for the defendant's insistence upon the issue of abandonment. This, we think, is the determinative point in the case. Circuit Judge Blatchford disposed of this particular contention and predicated his conclusions upon a letter written by the inventor to the Commissioner of Patents on January 13, 1851. This letter the court reproduces, as follows:

"Please pay to the order of George B. Simpson, claimant for insulation of telegraph wire, twenty dollars balance of patent fee to be refunded on rejection of claim."

In response to a defense rested upon abandonment of application, predicated upon the foregoing letter, the court said:

"His specification of 1849 is fairly to be considered, for the purposes of this suit, as an amendment of his two

specifications of 1848, and the application of January, 1848, is to be regarded as an application completed in 1849, in such wise that the application made in January, 1848, is to be regarded as a continuous application, rejected in October, 1849. By this statute, as it stood at the latter date, the applicant, on the rejection of his application for want of novelty, which was the ground of such rejection [fol. 20] of Simpson's application, had placed before him two alternatives. One was to elect to withdraw his application, whereupon, on filing a notice, in writing, of such election, he would be entitled to receive back $20. The other was to persist in his claim for a patent, whereupon, on filing a new oath, he could take an appeal. If he did not file a notice of his election to withdraw his application, he was to be regarded as persisting in his claim for a patent. In the present case, Simpson did not file any notice of his election to withdraw his application, or any notice that he withdrew his application. He asked for the $20, without withdrawing his application, and, although the office was not authorized to pay him back the $20 unless he withdrew his application it did so. The office may have regarded the request for the $20 as equivalent to a withdrawal of the application, but the statute is distinct, and a request to be paid 'twenty dollars balance of patent fee, to be refunded on rejection of claim,' can not be construed as a withdrawal of the application, even though the $20 was refunded and accepted. The statute is plain, and the applicant may have intentionally refrained from withdrawing his application, while, if the office had informed him that the $20 would not be refunded unless he first filed a withdrawal of his application, he might have refused to file such withdrawal, lest it might prejudice his rights. He left all the papers in the patent office. According to his own statement, he had refunded to Day the $20 fourteen months before he received it back from the patent office. Therefore, when he asked the office for the $20, it must have been solely because of his need of money. There is no act or declaration of his, in connection with the refunding of the $20, that can be construed into an abandonment of his application, or of his invention."

Manifestly the court did not have before it Simpson's letter of January 15, 1851, set forth at the end of Finding

II, in which the inventor unequivocally withdraws his application. The letter was in existence and available to the defendant. As a matter of fact, the complainant's counsel stated to the defendant's counsel upon the hearing that he had found this identical letter in the Patent Office, and brought it to his attention. The failure of the defendant to incorporate it in the record is commented upon by the court in the case of Colgate v. Western Union Telegraph Co., 19 Fed. 828, as follows:

"Whether it was assumed by defendant's counsel that the fact was not of sufficient importance to be incorporated into the proofs, or whether they supposed it would be treated by the court as a conceded fact, is not material, in view of the decision and opinion of the court rendered within a few days after the hearing, by which it was plainly indicated that the fact was a material one, and was not in the proofs."

The patent statute of 1836 states in part as follows:

"In every such case, if the applicant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back $20, part of the duty required by this act, on filing a notice in writing of such election in the Patent Office, a copy of which, certified by the commissioner, shall be a sufficient warrant to the Treasurer for paying back to the said applicant the said sum of twenty dollars. But if the applicant in such case shall persist in his claim for a patent, with or without any [fol. 21] alteration of his specifications, he shall be required to make oath or affirmation anew, in manner as aforesaid."

The opinion of the court is obviously sound in holding that the refund of the patent fee to Simpson in pursuance of the letter of January 13, 1851, was not in accord with the statute. However, it is to be especially noted that the refund of the fee was not made by the Patent Office until, as recited in Judge Blatchford's opinion, January 21, 1851, six days after the letter of January 15, 1851, a document which unquestionably met the requirements of the act of 1836 concerning refunds. The inference, we think, is irre-

sistible that the Commissioner refused a refund under the letter of January 13, 1851, and exacted the letter of January 15, 1851, two days later, prior to the payment of the refund on January 21, 1851. The fact is indisputable that the letter of January 15, 1851, was not before Judge Blatchford, and was not incorporated in the record in the first case of Colgate v. Western Union Telegraph Co. This is fully confirmed by the proceedings for a rehearing, denied by the court in Colgate v. Western Union Telegraph Co., 19 Fed. 828 (supra).

To cite numerous authorities upon the effect of the withdrawal of an application for patent and a failure to file a new one for a period of nearly eight years, wherein during the interim the invention has become known and gone into public use, is a useless proceeding. Suffice it to say that a careful examination of the cases in the briefs discloses no single instance wherein it has not been held that a proceeding akin to the instant case has not been held fatal to the patentee upon the ground of abandonment. Prior to 1861 the patent statutes fixed no specific limitation for the prosecution of applications for patents, and the issue of abandonment was uniformly determined upon general principles, taking into consideration the diligence of the applicant and the rights of the public, and Judge Blatchford's discussion of the lack of evidence of any affirmative abandonment upon the part of Simpson, due to his distressing poverty and treatment by the Patent Office, is, without the letter of January 15, 1851, unanswerable. To hazard an opinion as to what might have been the result in the first Western Union case (Federal cases, #2995), if the letter of January 15, 1851, had been incorporated in the record, is no part of the court's present duty. It is, we think, proper to observe that an insurmountable obstacle to the plaintiff's right to recover herein exists in the letter of January 15, 1851, found by the court and conceded by all parties to be a part of the transaction, and not heretofore made the part of any record adjudicating the validity of Simpson's patent, except as commented on in the motion for a rehearing in the case decided by Judge Wallace in 1884. (19 Fed. 828.)

The court being of the opinion that the jurisdictional act exacts an adjudication of plaintiff's rights under the

existing facts, i. e., is it possible for the plaintiff to recover in view of the facts found in 1916, but which were the facts in 1851—if so, render judgment, irrespective of the statute of limitations; if not, decide accordingly—can do nothing else except dismiss the petition.

It has long since been the law, established by precedent in the case of Schillinger v. United States, 155 U. S. 163, [fol. 22] and thereafter followed without exception, "that the United States may specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination, and courts may not go beyond the letter of such consent." While there may be some merit in plaintiff's contention of res adjudicata, and if the case was in a position to be heard in a court of competent jurisdiction this late day the insistence would be tenable, nevertheless it is our opinion that where Congress has before it all the facts and decisions of the courts respecting the subject matter of a claim against the Government, and determines by a special act to submit the case in its then condition to this court for a judicial determination of liability, the court is without authority to do more than take the case as it finds it and reach a determination in accord with its merits under the present record of facts, especially so when the facts of the case differ materially from the facts appearing in the record involving former adjudications.

The petition will be dismissed. It is so ordered.

Sinnott, Judge; Green, Judge; Moss, Judge; and Graham, Judge, concur.

[fol. 23] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of February, A. D. 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

VI. Application for Appeal and Order Allowing Same

From the judgment rendered in the above-entitled cause on February 4, 1929, the plaintiff, Arthur E. Colgate, administrator of the estate of Clinton G. Colgate, deceased, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States, in accordance with the provision for appeal contained in the special act under which this case comes to this court, which provision is as follows:

"That either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion of law or judgment, from which appeals now lie in other cases, at any time within ninety days after the rendition of judgment."

(Opinion of the court, foot p. 17, top p. 18.)

King & King, Attorneys of Record for Plaintiff.

Filed April 23, 1929.

Ordered that above application for appeal be allowed by the court as prayed for.
April 26, 1929.

[fol. 24] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 25] Supreme Court of the United States

Statement of Points Relied Upon by Appellant and Designation to Print Entire Record—Filed May 2, 1929

The appellant contends that the Court of Claims erred in dismissing his petition and in not awarding a money judgment for $50,000, and in support of that contention relies upon the following points:

1. The patent herein involved was sustained by the United States Circuit Court for the Southern District of New York in no less than nine different reported decisions cited in

either Finding V or in the opinion of the court, some of them in a case in which the United States sued Colgate, the intestate whom the present administrator represents, to cancel the patent, and the Court of Claims erred in not following the decisions of said United States Circuit Court as constituting authoritative decisions in favor of the validity of the patent herein sued on, and especially in not giving full effect to the decree of said Circuit Court in the action brought by the United States against Colgate to cancel the patent.

2. Said Court of Claims also erred in holding that the letter withdrawing the application for patent and requesting the Commissioner of Patents to refund the fee of $20 [fols. 26 & 27] invalidated a continuation and renewal of the application for patent and invalidated the patent issued thereon.

3. The Court of Claims erred in failing to carry out the intent of Congress in the passage of the special act of March 3, 1927, and in dismissing the petition, and in not rendering judgment for $50,000, as required by said act.

The appellant, in pursuance of Rule 9, designates the entire record filed herein for printing.

George A. King, George A. King, C. Bascom Slemp, C. Bascom Slemp, Louis Titus, Louis Titus, Attorneys for Appellant. A. A. Wheat, Acting Solicitor General.

May 2, 1929.

[fol. 28] [File endorsement omitted.]

Endorsed on cover: File No. 34,178. Court of Claims. Term No. 869. Arthur E. Colgate, administrator of the estate of Clinton G. Colgate, deceased, appellant, vs. The United States. Filed May 1st, 1929. File No. 34,178.